

No. 11567

In The
United States
Circuit Court of Appeals
For the Ninth Circuit

SHEVLIN-HIXON COMPANY, a corporation, *Appellant*,

vs.

GALINA M. SMITH, *Appellee*.

Appeal from the District Court of the United States for the
District of Oregon

HON. CLAUDE McCULLOCH, Judge

Brief of Appellant

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JURISDICTIONAL STATEMENT

This is an action at law between citizens of different states, (T. 3) in which the appellee claims damages of \$7,400.00 against appellant corporation (T. 7). Judgment in the sum of \$5,900.00 has been entered, based upon the verdict of the jury (T. 10). It is contended that the United States District Court for the District of Oregon had jurisdiction of this action on the basis of

the above facts, under 28 USCA Sec. 41, sub-paragraph (1) as amended; and that the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this appeal, under 28 USCA Sec. 225, sub-paragraph (a) as amended. (T. refers to transcript of record) Italics where used are supplied by appellant.

STATEMENT OF CASE

The judgment was entered in an action for damages by appellee as plaintiff against the appellant as defendant, for personal injuries which the appellee claims to have sustained while she was employed in appellant's box factory at Bend, Oregon. Appellee's work consisted of grading, sorting and bundling small size box lumber which had been cut by a sawyer. Her station was below and out of reach of a saw operated by the sawyer, who slid small pieces of box lumber down to the table where appellee worked. When working, appellee stood at a table 33" to 36" high, (about the height of an ordinary kitchen table) located on the floor level. Her station was about 3' square, surrounded on 3 sides by tables. The fourth side of the enclosure was formed by moving rolls which carried away the pieces of box material bundled by appellee. The means of entering this station was to walk on a catwalk, step or crawl over a rail to the top of the table, and then, at the choice of the employee, either sit on the table edge, and slide or jump to the

floor, or step to the floor, or jump from a standing position to the floor. At the time of her alleged injury, the appellee was entering her station. She had reached the table, and *in descending from the table to the floor she claims to have injured her knee.* Appellee could not say whether she jumped to the floor from a sitting position on the table or whether she jumped to the floor from a standing position on the table (T. 201). The only positive testimony on this point is that of the witnesses Leacock and Jeffries, who testified that she slid from a sitting position from the table to the floor. Neither the saw nor the rolls were operating at this time, as work had not yet started.

The testimony as to how appellee descended from the table to the floor follows: by witness Anna Jeffries (T. 244):

“Mr. Sims: She said she saw the accident.

“A. This is just exactly what I saw. I was up on the walk, the crosswalk, and I saw Galina going right behind—get right behind the bar and step over it and go down into the table. She sat on the edge of the table for a little while and, I don’t know, she just slid off there on the floor.”

And also by witness Edward Leacock, by way of deposition taken on behalf of plaintiff, and introduced in evidence by appellant (T. 208):

“A. * * * I was oiling up. She had anyway five minutes and was sitting on top of this table, which she only had about a foot to slide off to stand on her feet, and when I got ready I said ‘Ready for your lineup?’ She had already slid down off this table which wasn’t only about that high (indicating), I should judge.”

“Q. The witness is indicating about — do that again, Ed, will you?

“A. I should say about (indicating).

“Q. A couple of feet? A. Oh, no.

“Q. Twenty inches? A. Twenty inches.

“Q. All right twenty inches.

“A. And she slid down in there, and I asked if she was ready for her lineups, for her marks for the different grades. Mrs. Smith told me, to hell with the lineup. She said she had hurt her knee.”

Appellee was vague in her testimony and would not say whether she assisted herself in her descent from the table (T. 201-202) :

“Q. Will you state to the jury whether, in getting down off the table, you assisted yourself with your hands, or if you sat down so you could slide off, the way you usually slide off the table, or whether you jumped off the table?

“A. I really don’t remember just how I did go about jumping in there.

“Q. You don’t know whether you assisted yourself into the pit or not?

“A. I couldn’t say. I really don’t remember the way I did jump.”

Appellee based her right to recover on alleged violation of the Employers' Liability Act of Oregon (O. C. L. A., Sec. 102-1601). Appellant contends there is no evidence of any violation of the Employers' Liability Act which had anything to do with appellee's injury; that the mere act of descending especially if in a sitting position from a 33" or 36" table to the floor is not inherently dangerous as a matter of law and is not within the meaning of said act; that the trial court erred as a matter of law in refusing to direct a verdict in appellant's favor. There was no contention made of any common law liability.

Plaintiff contended that as a result of her descent from the table to the floor that

"she suffered a fractured bone and semilunar cartilage and other damage thereto, the exact nature and extent of which is unknown to the plaintiff, of her right knee, together with torn and wrenched ligaments of said knee." (T. 6-7)

The testimony produced on behalf of the appellee tended to show that she had a small foreign body, sometimes called a *knee mouse* in her knee, and also her knee showed signs of traumatic arthritis. There was no claim made by appellee in her pleadings or pre-trial order for traumatic arthritis, and medical testimony concerning it was speculative. With respect thereto, Dr. E. G. Chuinard testi-

fying for appellee stated that she told him that she did not land on her knee and further at (T. 96) :

“Q. She did not give you any history of twisting or spraining?

A. She said she could not remember. She said the pain was severe but she did not believe the knee had direct contact with the floor.”

And with respect to the foreign body or *knee mouse*, the same witness testified (T. 93) :

“Q. Is it not a fact that these little bodies develop as a result of hypertrophic arthritis?

“A. They may come from several things—

“Q. I asked that particular question: Is it not a fact that they do come from hypertrophic arthritis?

“A. You are speaking in general, not this one case?

“Q. Is that not a symptom of hypertrophic arthritis, to have some foreign body, bony substance, in the knee at times?

“A. Yes, it is often found.

“Q. It is very frequently found, is it not? Osteochondritis, don’t that start by an impairment to the blood supply in the knee? What is the fact about that?

“A. I think you are bringing up a point that was spoken of, osteochondritis dissecans. Yes, such a condition can occur, due to poor blood supply in any joint.”

This doctor's opinion as to appellee's knee condition was not based upon evidence produced in the case, but rather upon pure speculation as to what might have happened. When asked concerning the history he stated (T. 94-95) :

"Q. How much of a jump did the plaintiff tell you she had made?

"A. Well, I cannot answer that question now. I don't remember that she—she described this thing to me at the time but I can't tell you how many feet she jumped.

"Q. In the absence of knowing how far she jumped, is it not difficult for you to tell the jury that she landed with sufficient force that she would drive one bone against the other and break off a piece of bone?

"A. Well I presume that I did know at the time, but if I were to say definitely just how far a person jumped now, I cannot say because——"

And again at (T. 102) :

"Q. Although you do find foreign bodies very frequently in the knee joint? They call them 'joint mice?' A. That is right.

"Q. That is, without any accident at all?

"A. That is right.

"Q. Here, if it developed the plaintiff had had trouble with her knee prior to that time, that would be consistent with a diseased condition, would it not? (93)

“A. I would say this: I would rather believe this patient had had a previous injury which caused this trouble than that she had had any diseased condition which caused it. I can't say that these findings in her X-rays or her symptoms are due to this accident that she is claiming. I have no way of saying that. However, everything is compatible with that, but the appearance of the X-rays indicates to me definitely that at some time she had a trauma which caused her trouble, rather than a diseased process.

“Q. When you say that you probably hear about these things every day, according to the history she gave you, it is an unusual thing for you to find broken pieces of bone from the femur, is it not, from a trifling accident like that?

“A. It is not as usual as some things, but it is not unusual altogether. *Let me reiterate a point I made. I don't know that this came from the end of the femur. It might have been just a calcified hematoma.*” (Emphasis supplied)

Appellee denied she had any prior trouble with her knee. (T. 203-204) :

“A. *I had never complained of that knee up to the time of the accident. I had never had any trouble with it.*” (Emphasis supplied)

It was the theory of defendant that plaintiff's knee trouble was an old condition which she had prior to the alleged accident. Witness Anna Jeffries so testified (T. 242-243) :

“Q. I am asking you if you know. Did you ever hear Mrs. Smith ask to be put on that job?

“A. Mrs. Smith asked for the job.

“Q. Whom did she ask?

“A. She asked Guy Smith.

“Q. You heard that, did you? A. Yes.

“Q. Had you seen Mrs. Smith around there for some time? A. Yes.

“Q. State to the jury whether Mrs. Smith ever complained to you or indicated she had had trouble with her leg before May 15, 1943?

“A. Yes, sir. In February, we had a terrible snow storm (268) and I was snowed in and forced to walk to work. I went down to Mrs. Smith's house, and she asked me if I ever had my legs swell, and I told her my legs never swelled but my feet did, and she showed me—she said, ‘My knee is swollen. I don't know what it is—whether it is from standing or not.’

I said, ‘Well, you had better get you a hospital ticket and see about it, because it could be milk leg.’

“Q. Was that in February,—what year?

“A. That was in February 1943.

“Q. Did you ever see any other evidence, before this incident of May 15, 1943, indicating she had trouble with her knee?

“A. Yes, Galina was in her home — Galina showed me her leg, and it was swollen. She had a band on it of some kind—oh, they use them to wrap their legs if they have varicose veins or something. She had that on. It was in the wintertime. I saw this in Galina's own home.

“Q. Around the mill, did you see her favor her leg at all? A. Yes, she did.

“Q. When was that and where?

“A. In the rest room. We have one-half hour for our dinner period. Instead of an hour we have one-half hour and, naturally, when that whistle blows you are allowed to go to the clocks and punch out. I never ate very much in the ladies' rest room. We have a bed and we have two chairs in (269) there, and there was enough girls to take them up. Galina happened to find a nail—happened to find one of these nail kegs and she brought it into the rest room, and she always tried to get her a chair, and then she would put her feet up on the nail keg, and she would sit in the chair and eat her lunch and put her leg up on the nail keg. She said, ‘We have to get some benches in here,’ and so she brought in some boards—I don't know if she asked the millwright to make the benches or not but, eventually, we got benches in there.

“Q. She put her leg up on the keg? Was that before this accident? A. Yes, sir.

“Q. Of May 15th? A. Yes.”

There was other testimony to the effect that plaintiff, after the accident, stated that her knee had troubled her for a long period of time. A clear question was raised as to whether plaintiff's knee trouble was an old condition which she had before the alleged accident, and appellant contends that it was entitled to an instruction that appellee would not be entitled to recover for any pre-existing disability she may have had; and also an instruction that appellee could not recover on account of any arthritis inasmuch as no claim was made for any such injury.

Appellant also contends that there was no competent medical testimony at the trial to show that appellee's disability was caused by the accident. The testimony of appellee's medical expert was not based on any history as to the height of the table from which appellee descended; nor the manner of the alleged jumping movement. In the absence of such history, his testimony was worthless to prove that the descent from the table was the cause of the injury, and the jury was allowed to speculate and conjecture, just as the doctor had done, as to whether the jump, or some other cause, was responsible for her condition.

SPECIFICATIONS OF ERROR 1, 2 AND 4

1. That there is no competent evidence to support a verdict in favor of plaintiff;
2. That as a matter of law, there was no violation of the Employers' Liability Act; that the matter complained of was not the proximate cause of plaintiff's alleged injury;
4. The trial court erred in refusing to hold as a matter of law that the activity in which plaintiff was engaged at the time of her alleged injury, in getting down from a sitting position from a 33 to 36 inch table, was not inherently dangerous.

SPECIFICATIONS OF ERROR NUMBER 1, 2, AND 4

Specifications of error 1, 2, and 4 raise questions which are substantially alike and to the end of brevity and convenience, we consolidate our argument thereon. Reference to page citations refer to Oregon Reports unless otherwise noted.

POINT ONE: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A RECOVERY UNDER THE EMPLOYERS' LIABILITY ACT OF OREGON.

POINT TWO: THERE IS NO EVIDENCE OF NEGLIGENCE WHICH WAS THE PROXIMATE CAUSE OF THE ALLEGED INJURY.

ARGUMENT

Viewing the evidence in a light most favorable to appellee except where her evidence is of an inference only and there is positive evidence of the fact to the contrary, it appears that appellee, an employee, was injured while descending from a table not more than 36 inches in height, in appellant's box factory, where power driven machinery is used. There is no contention in this case that appellee was injured through the use of machinery or electricity. Appellee relies entirely upon that part of

the Employers' Liability Act of Oregon, which is commonly known as the "and generally" clause, as follows:

"* * * and generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Appellee based her right to recover under the Employers' Liability Act on the contention that the general work in which defendant was engaged was inherently dangerous (T. 7). This contention was based on the erroneous belief that where the general occupation of an injured employee is one involving risk and danger, that an injury sustained while he is performing an act which is not inherently dangerous would be subject to the act. This was an impression held rather extensively by Bench and Bar as a result of a decision of the Supreme Court of the State of Oregon in the case of *Fitzgerald v. The Oregon-Washington R. and Nav. Co.*, 141 Or. 1, 16 P. (2D) 27, decided November 15, 1932. The Fitzgerald decision was an authority relied upon by this Court in the former appeal of this case. The Supreme Court of

Oregon has finally dispelled the impression in the recent case of *Barker v. Portland Traction Co.*, 43 Oregon Advance Sheets 49, rehearing denied, 44 Oregon Advance Sheets 377, on March 25, 1947. This decision makes clear that an injured employee in order to be within the Employers' Liability Act must be performing work which is inherently dangerous at the time he sustains his injury. It is not enough that his general work may involve risk and danger; but, on the contrary, although his general work involves risk and danger, if such an employee sustains an injury while performing an act which is not inherently dangerous, he is not entitled to the benefits of the Employers' Liability Act. Otherwise, as the Supreme Court of Oregon points out, there would be two different rules applied to the same type of accident to employees working for the same concern. Illustrating this point the Court states at P. 382:

"If the contention which we just quoted from the respondent's brief is correct and if, therefore, an employee, whose duties have 'the general characteristics' of inherent risk and danger, is entitled to the benefit of the act for an injury which befell him while he was doing something unaffected by inherent risk or danger, then it is possible for two employees who were injured simultaneously by a negligent act of their employer to receive treatment by the courts entirely dissimilar. Let us assume a hypothetical case in which two employes of an electrical concern are injured in the company's warehouse by the falling of ceiling plaster. If one were a lineman who generally worked

on the company's poles among power wires, the respondent's construction of the act would entitle him to the act's liberal provisions when he sued his employer for damages. Those provisions, which are several and important, include the one which exacts of employers subject to the act a very high degree of care. Other provisions which would be material in such an action deny to the employer the defenses of contributory negligence and of the fellow servant rule. In the event the employe died as a result of his injury, another provision of the act would enable his widow to maintain a damage action in her own name and still another would authorize her to sue for an unlimited amount of damages. Now let us look at the situation of the other employe in our hypothetical case, and let us assume that he was a bookkeeper who performed all of his duties in the warehouse. In an action by him to recover damages for the personal injury he incurred simultaneously with the other, and by the same tortious act, the respondent would not, we believe, contend that he would be entitled to the benefits of the Employers' Liability Act. This latter employe would, therefore, be relegated to reliance upon common law standards."

When we eliminate the general operation being carried on by appellant as a means of attempting to bring this case under the Employers' Liability Act, we have left only the simple act of descending from a reasonably low table to the floor—an act which thousands of persons find themselves doing year in and year out. *The person himself who is descending from a table to the floor is in the best position to know the manner in which he should*

descend, and his own strength and capabilities in that respect. The Supreme Court of Oregon in *O'Neill v. Odd Fellows Home*, 89 Or. 382, 174 Pac. 148, has held the Employers' Liability Act inapplicable where an employee was injured while descending from a stepladder of approximately the same height as the table here. The Court held as a matter of law that the Employers' Liability Act did not apply, pointing out in doing so that all work involves some risk and danger, but that is not sufficient, but rather the act being done must be "beset with danger." In the O'Neill case the plaintiff complained that the defendant had violated the Employers' Liability Act in that it:

"* * * negligently directed this plaintiff to use a small portable wooden stepladder; that while plaintiff was descending said stepladder in the discharge of her duties, her skirt caught upon the top thereof, and on account of the dangerous and defective condition of said stepladder as hereinafter set out, became fastened thereon, and caused said ladder on account of its dangerous and defective condition as hereinafter set out, to move or shift by reason of which plaintiff was caused to and did fall from said ladder to the cement floor with great force and violence, and by reason thereof sustained injuries."

It will be noted that the plaintiff was descending said stepladder when the accident occurred. It was further claimed that numerous improvements should have been

made and appliances furnished by the defendant in order to make the work safe. The Court states that (P. 389):

"It is a general rule of statutory construction that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned, unless the legislative intent clearly appears to the contrary: Black on Interpretation of Laws, P. 141; 2 Lewis' Sutherland Statutory Construction, § 360. In a certain sense, there is a risk or danger in a person going up or down an ordinary flight of stairs in a home, but this is not the kind of risk or danger embraced within the meaning of the statute. It would hardly be said that a person's work which required him to go up and down ordinary stairs, or hang clothing on a line using a common stepladder two or three feet in height not inherently defective, and with no particular danger involved therein, would be likely to harm or would be perilous, hazardous, or unsafe. The whole language of the act denotes that the kind of employment thereby protected is that which is beset with danger, the hazardous, dangerous employments similar to those enumerated in the act, or which under the circumstances or manner in which it is being executed is rendered dangerous, within the meaning of the act: See *Olds v. Olds*, 88 Or. 209 (171 Pac. 1046, 1048). We therefore hold that the case, as delineated by the complaint and the admitted portions of the answer, does not come within the employers' liability law."

And again in *Isaacson v. Beaver Logging Co.*, 73 Or. 28, 143 Pac. 938, the Oregon court held that:

"The employment of a servant in removing an iron spool, weighing 250 to 300 pounds, from a truck upon a railroad track not to be within the application of the act."

Voluntary Bodily MOVEMENT Not Covered by Act

The Employers' Liability Act of Oregon was never intended to cover a mere bodily movement, especially when the manner of the movement is controlled by the employee. That was the precise situation in the O'Neill case, it is the precise situation in this case. For other cases holding the Act inapplicable as a matter of law, see *Hoffman v. Broadway Hazelwood*, 139 Or. 519, 10 Pac. (2d) 349, 11 Pac. (2d) 814; *Ferretti v. Southern Pacific Co.*, 154 Or. 97, 57 Pac. (2d) 1280; and *Ridley v. Portland Taxicab Co.*, 90 Or. 529, 177 Pac. 429.

In *McGivern v. Northern Pacific Railway Company*, 132 F. (2d) 213, the basis of the court's decision in holding there was no substantial evidence tending to prove negligence on the part of defendant, in connection with its duty to furnish its employees with a reasonably safe place in which to work, or in connection with the employer's duty to furnish the employees with "appropriate tools and appliances" (citing from an Iowa case) was stated at P. 218:

"he was hurt because his bodily movements did not take into consideration what he knew to be a necessary incident of his work."

Appellee here knew all the conditions surrounding her employment, she had worked at numerous tasks and there was no compulsion that she work at this particular one (T. 200-201) :

"Q. (By Mr. Powers) : Is it not a fact that, while you were working there, you changed jobs very frequently and, at your request, were put on several different jobs?

"A. It was customary for the girls to change jobs there, because they were supposed to be able to take the places of the men that left to go to war and they were required to change jobs.

"Q. I will ask you: Did you not, on numerous occasions, ask for this job or that job, and that any switching around was at your own request?

"A. I don't remember ever asking, but I was put on several different jobs there.

"Q. I will ask you if it is not a fact that you knew the nature of the work on this cutoff saw and had known it for many months prior to the time you started working on the cutoff?

"A. The reason they put me on the high cutoff—

"Q. I am asking you whether you knew what work there was to be done there, and how you would get in and out? A. Yes. (205)

"Q. You knew about that? A. Yes."

There was positive testimony she requested the particular work (T. 242).

The courts in denying liability where an accident occurs through a purely voluntary bodily movement, base their decision upon the fact that an employee himself knows best his own strength and physical capabilities, and in denying recovery where an accident occurs through some voluntary bodily movement on the part of the injured employees, the courts merely recognize the fact that an individual himself is in the best position in making a simple bodily movement to exercise care for his own safety. This doctrine is somewhat akin to the simple tool doctrine, that is where an employee is injured while using some simple tool such as a stepladder or other appliance which is in common everyday use. In denying recovery to an employee injured in descending from a stepladder, or falling therefrom, or through a stepladder slipping, the Courts deny recovery for the reason that the injured person himself should know how to use the tool or appliance safely, the same as he should know how safely to make a simple bodily movement. See Annotation 145 ALR 542. The same doctrine is recognized by the Supreme Court of Oregon in the case of *Freeman v. Wentworth & Irwin, Inc.*, 139 Or. 1, 7 Pac. (2d) 796. The Oregon court further points out in that case that

an employer has no duty to furnish the most improved tools or latest methods (P. 11) :

“As we have said before, the duty to use due care for its employees’ safety did not require the defendant to supply the latest and most improved tools, but only such as were reasonably safe and of a kind generally used for that purpose.”

Also see *Abbott v. Portland Trust & Savings Bank*, 160 Or. 699, 86 Pac. (2d) 962, (P. 701) :

“‘As we view the matter, the careless and negligent manner in which plaintiff placed her hand in contact with the rollers while in operation was the proximate cause of her injuries.’”

The Oregon Court cites with approval *McGivern v. Northern Pacific Railway Co.*, *supra*. In *Waller v. Northern Pacific Terminal Co.*, 42 Oregon Advance Sheets 215, the Oregon court set aside a verdict on ground of insufficient evidence. The action was brought under the Federal Employers’ Liability Act, plaintiff claiming, among other things, that the defendant railroad company had failed to furnish a “reasonably safe place to work.” The accident actually occurred through a *bodily movement* of the plaintiff (P. 220) :

“Plaintiff took hold of the grab iron on the side and at the rear end of the box car with his right hand,

turning to get hold of the grab iron. He then started to put his right foot on the stirrup, which is a piece of strap iron that comes down about eighteen inches below the sill of the car. As he attempted to put his right foot in the stirrup, his left foot slipped and he fell under or between the cars with the result that the car behind the one which he had attempted to board ran over his arm causing the injuries in question."

Plaintiff there testified that as a result of defendant's negligence he stepped on a stick which rolled under his foot and caused him to fall. However, upon cross-examination it developed that the plaintiff thought it was a stick he stepped on; the inference was that it was a stick, but the court held that was insufficient, stating (P. 235) :

"As we have said, in determining whether there was substantial evidence of negligence proximately causing plaintiff's injury, it is our duty to consider the testimony in the light most favorable to the plaintiff; but it is also our duty to give consideration to evidence adverse to the plaintiff's contention where it is wholly undisputed and uncontradicted and relates to matter of fact as distinguished from mere inferences. Where a plaintiff's case is based upon an inference or inferences only, that case must fail upon proof of undisputed facts inconsistent with such inferences. Pennsylvania Railroad Co. v. Chamberlain, 288 U. S. 333, 77 L. Ed. 819, 53 S. Ct. 391."

And the court continues, (P. 238) :

"The defendant is not the insurer of the safety of its employees and is not under any obligation to

keep the premises absolutely safe. *Patton v. Texas and Pacific Railway Co.*; *McPherson v. Oregon Trunk Ry.*; *supra*.

“Failure to guard against a bare possibility of accident is not actionable negligence. *Brady v. Southern Ry. Co.*, *supra*. The plaintiff must present more than a mere scintilla of evidence of negligence. Substantial evidence is required. *McGivern v. Northern Pac. Ry. Co.*, *supra*; *Poe v. Illinois Central Railroad Co.*, 335 Mo. 507, 73 S. W. (2d) 779.

“‘It cannot be said that the situation did not present dangers but danger in a particular phase of an employment does not necessarily imply negligence. * * * Temporary conditions created by employees using or failing to use appliances furnished by the employer are not defects for which the employer may be held responsible in damages.’

McGivern v. Northern Pac. Ry. Co., *supra*.”

The appellee’s testimony here, the same as in the Waller case, leaves the manner as to the happening of the accident uncertain and vague. It is true there is an inference which might be drawn from appellee’s testimony, but such inference alone is insufficient, especially so where there is competent substantial testimony as to the manner in which the accident actually happened. While appellee’s testimony was vague and uncertain, the testimony of witnesses Leacock and Jeffries was definite and certain. This being the situation the inference created by the plaintiff’s testimony is dispelled and the situation

here when tested in the light of the Waller decision requires that consideration be given to the evidence of appellant showing the fact to be that appellee slid from the table to the floor from a sitting position; an act which hardly anyone could contend was "beset with danger."

It was held in *Winslow v. Missouri, K. & T. Ry. Co.*, 192 S. W. 121 (P. 123 Syllabus 17) :

"If a railroad brakeman's jumping out of a freight car with a weak ankle alone caused his injury, and it was not produced in any way by a hole negligently left in the right of way by the road, the brakeman could not recover anything under the federal Employers' Liability Act."

Again it was held in *Bottig v. Polsky*, 101 Ore. 530, 201 Pac. 188, that the words "any work involving a risk or danger" as used in the Oregon statute, apply only to employments which are inherently dangerous.

It is our contention that the act which appellee was performing at the time of her alleged injury was not inherently dangerous and at most was merely a voluntary bodily movement on her part. The decision in the Barker case fully supports our contention.

In the Barker case, the plaintiff was a streetcar operator and the defendant was his employer. Just prior to his injury, plaintiff had stopped his car at a "switch."

Several inches of snow had fallen, and the automatic mechanism of the switch was clogged with snow and ice, and it did not function properly. The plaintiff descended from his car, took a broom and a steel rod with a chisel-like point, called a "switch rod"; swept away the loose snow, dug out the packed snow and ice from the switch, and while so doing slipped, through his own "bodily movement", fell and was injured. He claimed the Employers' Liability Act applied, because his general occupation involved "risk and danger." His complaint alleged various specifications of negligence, including *failure to provide a safe place to work*; failure to provide proper materials for the work he was doing; and failure to provide proper tools. The trial court refused to direct a verdict for defendant; the jury returned a verdict for the plaintiff. The Supreme Court reversed, holding that the motion for a directed verdict should have been granted; and in so holding expressly denied plaintiff's contention that if the general characteristics of an employment are hazardous, the "and generally clause" applies and makes the employer subject to the Act. The Court referred to the work being performed by the plaintiff in that case as follows:

"The removal of snow from the sidewalk in front of homes and stores by the occupants occurs every time snow falls. It is an operation of such a simple kind that householders and storekeepers entrusted

performance to their children and to itinerant laborers. Seemingly they do not think of it as being attended with any noticeable risk or danger. There is, of course, the possibility that one's foot may slip, as did the plaintiff's, but such may also happen to any one who ventures out of doors when snow is upon the ground. In fact, a servant who works indoors may slip on a waxed floor."

The reasoning of the Court in the Barker case fits into the facts here. Appellee's act of descending from a table not more than 36 inches in height, would *be neither more nor less dangerous when performed in a box factory, in a warehouse where no machinery was used, or in a private home.* The fact there was machinery in the building, and that in the course of her work she might be exposed to danger from that machinery, had nothing to do with her injury, and did not increase the hazard of the simple act which she was performing. In the Barker case, *supra*, the plaintiff was standing on a streetcar track, with trolley wires, carrying a heavy load of electricity, directly above him, and his streetcar, full of many kinds of machinery, directly adjoining him; but the Court looked, not to his surroundings, and not to the hazards of his usual employment, but to the simple nature of what he was doing at the time he was injured. The applicability of the Court's reasoning when applied

to the facts here is plain and we submit fully supports our contention.

In considering the impact of the Barker case upon cases like this one, however, it should be borne in mind that the decision in that case represents a complete reversal of the formerly accepted interpretation of the "and generally" clause; and that the Court went out of its way to make plain that it would not hereafter accept the general nature of an injured person's employment as a basis of imposing liability under the Act.

The Court points out, in its original opinion and in its opinion on rehearing, that if the applicability of the act depended on the general nature of the employment, there would be many instances in which two employees, injured from the same cause, would have entirely different rights of action; for instance, where one employee engaged generally in work involving "risk and danger," and the other not, and injured in the same manner (some act not inherently dangerous). In discussing this possibility, the Court said (Vol. 44 Advance Sheets, p. 383):

"Since courts never assume that legislation is intended to accomplish illogical results and divide people into favored and unfavored classes, the results which would follow from the respondent's construction of the act are worthy of mention. Hence, our delineation of the above situation."

Under the Oregon law defendant was entitled to a ruling by the lower Court that the Employers' Liability Act was inapplicable and a verdict directed accordingly in its favor.

SPECIFICATION OF ERROR NUMBER 3

The trial court erred in failing to instruct the jury properly as to the law in regard to the Employers' Liability Act with reference to the facts which the jury must find in order for said act to apply.

ARGUMENT

Assuming for the purpose of this argument that there was a question to be decided by the jury under the evidence as to whether plaintiff's act in descending from the table to the floor involved risk and danger, under the Oregon Employers' Liability Act, we submit the lower court erred in failing to instruct the jury properly as to the law respecting defendant's liability, if any, under the Employers' Liability Act. This being an action for negligence the jury should have been instructed as to what constitutes negligence and should have been

instructed on plaintiff's duty to prove by preponderance of the evidence that the defendant was guilty of negligence in the particular charged, and that such negligence, if any, was the proximate or contributing proximate cause of the accident. Further the Court erred in failing to instruct the jury in respect to the question of whether it was or was not "practicable" to operate with the appliances or improvements which plaintiff contended defendant failed to furnish without interfering with "the efficiency of the" operation. (T. 250) The Court's instruction virtually placed on defendant the obligation of an insurer, by failing to define for the jury the pertinent factual issues. Further, the Court deprived defendant of its theory of defense in instructing only as to appellant's contributory negligence. The defense and contention of the appellant was that the accident occurred through the sole negligence of plaintiff, and any failure to furnish other means of descending from the table to the floor would not be a proximate cause of the accident. *Under the Employers' Liability Act plaintiff could not recover in the event plaintiff's own negligence was the sole cause of the accident.* This is an instruction repeatedly given in the state courts and the appellant was entitled to have the instruction given here. The jury, under the instruction given by the Court on contributory negligence and without any instruction to the effect that appellee could not recover

if her negligence, if any, was the sole proximate cause of the accident, proceeded to consider the case in a confused light; the jury was left completely in the dark without any instruction from the Court as to the law in the event that they should find that appellee's sole negligence was the proximate cause of the accident. The jury under the Court's instruction was not advised that a complete defense to the action would be appellee's own negligence, if it were the sole proximate cause of the accident. The Court's failure to so instruct deprived appellant of its theory of defense and constituted prejudicial error. *Barnhart v. North Pacific Lumber Co.*, 82 Or. 657, 162 Pac. 843.

In *Winslow v. Missouri K. & T. R. Co.*, 192 S. W. 121 (Mo.), the court in considering a case where a brakeman was injured through jumping from a box-car to the ground, in reversing judgment in favor of the injured employee, held (Syllabus 11 and 12, P. 122) :

"In such action an instruction that, if the jury found certain facts as to plaintiff's employment, his duty to inspect cars and close doors, and that, in the performance of the duty, he got into a car, and 'while alighting from said car door he stepped or jumped into a wash-out * * * which the defendant carelessly and negligently permitted to exist in its railroad yard * * * and which it carelessly and negligently permitted to be covered with weeds or brush,' and was injured, verdict should be for plaintiff, did not submit any question to the jury, being merely a description

of the hole, or an assertion that it was carelessly and negligently permitted to exist."

"In such action such instruction telling the jury that if, while alighting from the car door, plaintiff stepped or jumped 'into a washout, hole, or depression,' then, etc., was erroneous as failing to submit the question whether the right of way was in a reasonably safe condition, and such as would ordinarily be maintained at such a place by reasonably prudent railroad men."

A party is entitled to have his theory of defense submitted to the jury in clear and concise language. The rule is stated:

"* * * in 53 Am. Jur., Trial, pp. 431, 432:

" 'A charge to a jury should, if possible, be concise, plain, simple, and easily understood. It should be couched in clear, intelligible language, and such in its language and meaning as may be readily applied by the jury to the evidence. It is not sufficient that an instruction contains a correct statement of the law. An instruction should be so clear and concise as to be readily within the comprehension of men such as jurors who are not ordinarily educated in the law. If it is so worded that it might convey to the mind of an unprofessional man of ordinary capacity an incorrect view of the law applicable to the case, it is erroneous.'

and again, at pp. 434, 435:

" 'They should be definite and certain, as applied to the facts of the case at bar, leaving nothing to

inference. They should be intelligible, free from obscurity, involvement, ambiguity, metaphysical intricacy, and doubt. The language of an instruction should be so plain that no doubt can arise as to its meaning, and that there is no chance of misunderstanding. A requested charge obnoxious to any of these objections should be refused even though, on dissection, it may be found to assert a correct legal proposition.'

"As further stated in 64 C. J., Trial, p. 668:

"‘‘An instruction may be misleading which * * * contains only a partial statement of the law, or bases the right of recovery on inconclusive facts.’'

"See also Peters v. Consolidated Freight Lines, 157 Or., 605, 617 and Reid’s Branson, Instructions to Juries, sec. 103."

The instructions were barren of any duty on the part of the plaintiff to exercise ordinary care for her own safety; and in this respect and the several other respects set forth above, the jury was unadvised as to the law to the prejudice of the defendant.

SPECIFICATION OF ERROR NUMBER 5

The trial court erred as a matter of law in failing to instruct the jury properly as to the measure of damages

ARGUMENT

It was appellant's contention that appellee's knee trouble was not the result of the accident, but was a pre-existing condition which she had had for some time. There was evidence on behalf of appellant that appellee stated after the alleged accident that her knee had troubled her for a long period of time (T. 233). Also a fellow worker testified that appellee had been having trouble with her knee prior to the alleged accident (T. 241-242). There was no contention made by appellee at the time of the accident that she had sustained any knee injury, but on the contrary, she stated after the accident that she had been having trouble with her knee for a long period of time, and accordingly appellee made application to appellant for benefits on account of her knee—the same condition she claims for here as a non-accidental condition; and she accordingly was paid benefits by appellant, therefor, in the sum of \$180 (T. 204). Also her hospital bills were paid on that basis.

In line with appellant's contention and the evidence produced, it was entitled to have the jury instructed as to its theory of defense and to the effect that if appellee's knee trouble was the result of a pre-existing disease or condition, that she could not recover in the present action. This was an important issue in the case,

and the jury had no instruction concerning this issue at all. In addition to the evidence mentioned above the medical evidence introduced on behalf of appellant very definitely shows that appellee's condition was not the result of accident. The trial court's failure to instruct on this important issue was prejudicial error. A party is entitled to an instruction on the essential issues as well as on the theory of his defense. Here the jury was left in the dark, and under the instructions given the jury could return a verdict in favor of the appellee, which it did regardless of the law respecting these important issues.

The situation is one to which the following rule well established in the state of Oregon is particularly applicable, as stated in *Merriam v. Hamilton*, 64 Or. 476, 481 (130 P. 406) :

“ ‘Where there are two or more possible causes of an injury for one or more of which the defendant is not responsible, the plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render the defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as much as the other, the plaintiff cannot recover.’ ”

See also *Doumitt v. Diemer*, 144 Or. 36, 43; *Simpson v. Hillman*, 163 Or. 357, 364; *Horn v. National Hospital Assoc.*, 169 Or. 654, 668; and *Parker v. Pettit*, 171 Or. 481, 490, citing 45 *C. J.* 1167, and 38 *Am. Jur.* 1034.

This is a case in which it is apparent that there were two possible causes of plaintiff's present condition; admittedly the condition of her knee could have resulted from disease and appellee failed to sustain the burden of proof that her present condition was either solely or partially caused by the accident and appellant was entitled to an instruction limiting damages recoverable accordingly.

SPECIFICATION OF ERROR NUMBER 6

The trial court erred in refusing to instruct the jury, as requested by appellant, that appellee could not recover for any injury or disability caused by traumatic arthritis, no claim having been made for traumatic arthritis.

ARGUMENT

Dr. Chuinard, appellee's medical expert, testified at the trial (T. 90-91) :

“Q. Ordinarily, if you have a traumatic arthritis, it continues to develop, does it not?

“A. Well, not always, in a young person; if it is fairly superficial, that is, the cartilage has not been completely broken off so that the bone is entirely uncovered, then you usually do not get a continual—

“Q. Arthritis is shown by the roughening of the bones, is that what it is?

"A. That is right.

"Q. You have examined the X-rays taken on June 7th, I think it is marked, within three weeks after the accident. Will you state to the jury that, in your opinion, that roughening came as a result of an accident that occurred only two or three weeks before?

"A. Yes, it could.

"Q. In your opinion, Doctor, did that come as a result of anything that occurred just a short time, two or three weeks before?

"A. It *could* have, yes.

"Q. And your opinion is that it did, from the history given to you by the plaintiff?

"A. Yes, and ruling out any other cause of it. I mean, I have to rely on the previous history. It fits into the history she gave, yes.

"Q. What history did she give you about jumping, Doctor? You said no twisting, no sprain, that she knew of; she did not strike her knee against anything. What history was it that would indicate traumatic arthritis to you?

"A. The arthritis itself—I think I perhaps see what you are getting at. The arthritis itself is not something that happened immediately. Arthritis is a chronic roughening of the joints. It is something that remains after the whole thing is over. You see in the X-ray the smooth contour of the surface of the bone. That still remains. That is why I say now that the patient has *chronic traumatic arthritis* of her knee joint." (Emphasis supplied)

In her complaint (T. 6) the appellee claimed only that she sustained "a torn and severed semi-lunar carti-

lage in her right knee and torn and wrenched ligaments that repeatedly become torn and wrenched whenever she tried to walk." She made no claim, at any time prior to the trial, of traumatic arthritis or any similar condition. In his instructions to the jury, the trial judge made no mention of traumatic arthritis, and refused to give appellant's requested instruction 14, which would have instructed the jury not to consider any evidence of traumatic arthritis which appellee might have.

The Supreme Court of Oregon has held that where plaintiff's complaint specifies certain injuries alleged to have been suffered, evidence may not be received of other injuries not necessarily resulting from those specified. *Maynard v. Oregon R. R. Co.*, 43 Ore. 63. The same rule is set forth in 15 Am. Jur., Damages, Sec. 311, as follows:

"As a general rule, if the plaintiff in his pleading specifies injuries received, his recovery will be limited to such injuries as he alleges and such as necessarily and immediately flow therefrom; under such specific allegations he will not be permitted, against objection, to prove and recover for injuries which are not reasonably to be inferred as following from those alleged."

Dr. Chuinard, appellee's medical expert, testified (T. 87) that appellee's traumatic arthritis was a roughening of the articular cartilage. This is certainly an entirely

different thing from the torn and severed semi-lunar cartilage and the torn and wrenched ligaments appellee complained of in her complaint. It is an entirely separate condition, of which appellant had never before been advised, and for which the appellee had never before made any claim. Nevertheless, Dr. Chuinard testified (T. 87) :

“I do not believe this knee will ever be as good as it was before it was injured. That statement is based upon the fact that the patient has a roughening of the articular cartilage. * * * Another term used is traumatic arthritis, on the basis of trauma or injury.”

This was, in fact, the only claim made on appellee's behalf that her knee would never be as good as it was before. It was evidence of a kind peculiarly calculated to create sympathy for the appellee in the minds of the jury, and undoubtedly influenced their verdict, to the great disadvantage of appellant.

SPECIFICATIONS OF ERROR NUMBERED 7 AND 8

7. That there is no competent medical evidence sufficient to support the jury's verdict in favor of plaintiff, in that the only medical testimony as to the cause of the

injury is based upon hypothetical situations, not connected with the facts shown by the evidence; it appears from the testimony of plaintiff's medical expert that he had no history, knowledge or information as to manner, distance or height plaintiff jumped, or whether she jumped from a sitting position:

8. There is no competent medical evidence in this case sufficient to support the jury's verdict, in that plaintiff's medical testimony showed only possibility rather than probability of injury. The jury was required to speculate and conjecture as to which of two or more causes was responsible for plaintiff's alleged injury.

ARGUMENT

We respectfully submit that these two specifications are so closely related in substance that they can most conveniently be argued together.

Dr. Chuinard, appellee's medical expert, when asked to give the history of the patient on which he based his opinion as to the cause of the injury, stated (T. 86) :

"She told me she injured her right knee on the 15th of May, 1943, when she jumped in the act of working; that she landed on her feet and at that time most of the weight seemed to be on her right leg, and she experienced sudden pain, severe pain in her right knee. When I questioned her as to this, she said, as

far as she could remember, there was no direct contact of the knee with the ground or the floor or any object and that she does not remember a severe twisting or sprain of the knee."

Later, he testified further (T. 94-95) :

"Q. How much of a jump did the plaintiff tell you she had made?

"A. Well, I cannot answer that question now. I don't remember that she—she described this thing to me at the time, but I can't tell you how many feet she jumped.

"Q. In the absence of knowing how far she jumped, is it not difficult for you to tell the jury that she landed with sufficient force that she would drive one bone against the other and break off a piece of bone?

"A. Well, I presume that I did know at the time, but if I were to say definitely just how far a person jumped now, I cannot say because——"

When the appellee was asked concerning her method of jumping, the following dialogue occurred (T. 201-202) :

"Q. Will you state to the jury whether, in getting down off the table, you assisted yourself with your hands, or if you sat down so you could slide off, the way you usually slide off the table, or whether you jumped off the table?

"A. I really don't remember just how I did go about jumping in there.

“Q. You don’t know whether you assisted yourself into the pit or not?

“A. I couldn’t say. I really don’t remember the way I did jump.”

The opinion of an expert witness must be based on facts. Those facts must be obtained either from his personal observation, or from a set of facts submitted to him, usually in the form of a hypothetical question. In the latter event, the facts submitted must be based upon some evidence in the case.

Lippold v. Kidd, 126 Or. 160, 269 P. 210;

Heider v. Barendrick, 149 Ore. 220, 39 P. (2) 957;

Cobb v. S. P. & S. Ry. Co., 150 Ore. 226, 44 P. (2d) 731.

The fatal weakness of Dr. Chuinard’s testimony is apparent. Obviously he was not present when the appellee was injured. The only evidence in the case as to the method of descent used by appellee, was her own testimony. She was always careful to say that she “jumped,” even while admitting that she did not know whether she sat down so she could slide off the table. However, taking into consideration the height of the table, the wide variety of possible methods of “jumping” which might be embraced within appellee’s nebulous recollection, and

the equally wide range of possible severity of impact caused by the various methods, it is plain that Dr. Chuinard did not have sufficient facts in his possession on which to base an opinion that appellee's jump was the probable cause of her injury; and any opinion that he did offer on that subject was necessarily worthless.

It is not sufficient for the appellee to show that her alleged jump was the possible cause of her injury. It was necessary for her to show, in order to prevail, that the jump was the probable cause.

Lippold v. Kidd, supra.

Other possible causes of the condition of appellee's knee were shown by the evidence. Dr. McClure, appellant's medical expert, testified (T. 148-149) that it could be caused by a condition known as osteochondritis dissecans. Mrs. Jeffries testified (T. 242-243) that appellee had had trouble with her knee, causing it to swell, before the date of the accident alleged in her complaint. We do not believe that the vague and uncertain testimony in this case provides any foundation on which a jury could properly find that the probable cause of plaintiff's injury was the jump of which she complains.

In conclusion, it is submitted that the trial court erred with respect to each specification of error presented herein, and that this case should be reversed.

Respectfully submitted,

VEAZIE, POWERS & VEAZIE.

